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IN THE

Supreme Court of the United States

OCTOBER TERM 1935.

No. 67.

MORRIS MILLER,

Petitioner,

—against—

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Sarnoff-Irving Hat Stores, Inc., Bankrupt,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENT.

IRVING L. ERNST,
LESTER D. MELZER,
Counsel for Respondent.

THE COURT PRESS, N. Y. C.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF RESPONDENT.

Opinions Below.

The opinion of the Referee (Honorable Oscar W. Ehrhorn) (R. 38) is not reported in the Federal Reporter or Supplement.

The opinion of the District Court (per Hulbert, J.) (R. 43-48) is reported at 10 F. Supp. 733.

The memorandum opinion of the Court of Appeals for the Second Circuit (R. 52) is reported at 77 Fed. (2) 1012.

Statement of Facts.

In 1928 the petitioner, Morris Miller, entered into a written lease with the bankrupt, Sarnoff-Irving Hat Stores, Inc., wherein petitioner leased

to the bankrupt certain premises at 203 Springfield Avenue, Newark, New Jersey, for a term commencing August 1st, 1928 and ending July 31st, 1938, at an annual rental of $4500 for the first two years of the term, $5000 for the next three years and $5500 for the balance of the term, payable in equal monthly installments (R. 5-12).

The lease contained a covenant continuing the liability of the tenant to the end of the original term, in the event of the sooner termination of the lease by the landlord, by reason of certain defaults of the tenant. This covenant provided that upon such termination of the lease *the tenant shall pay to the landlord during the balance of the original term the deficiency between the rent reserved in the lease and the avails of reletting, as such deficiency shall accrue from month to month* (R. 7), and was similar in all pertinent respects to the indemnity covenant considered in *Manhattan Properties, Inc.* v. *Irving Trust Company*, 291 U. S. 320. The tenant, the bankrupt herein, entered and took possession of the premises and remained in possession until April 27th, 1932, upon which day an Equity Receiver of all the property of the bankrupt was appointed by the United States District Court for the Southern District of New York, and took possession of the premises (R. 20). The Equity Receiver disaffirmed the lease on June 1st, 1932 and vacated the premises on July 18th, 1932 (R. 21). Petitioner, the landlord, reentered the premises and took possession thereof on July 25th, 1932 (R. 21).

On August 27th, 1932 the bankrupt, Sarnoff-Irving Hat Stores, Inc., filed a voluntary petition in bankruptcy in the United States District Court for the Southern District of New York, and was adjudicated a bankrupt on the same day (R. 21). The respondent is the trustee in bankruptcy of the said bankrupt.

The petitioner thereupon filed his proof of claim in the bankruptcy proceeding for $16,625 (R. 1-4), which amount petitioner arrives at in the following manner:

(a) Rent for the months of March and April, 1932, at the rate of $300.00 per month, in all amounting to the sum of	$600.00
(b) The sum of $16,025.00, representing the difference between the rent reserved in said lease for a period beginning with May 1st, 1932, and ending July 31st, 1938, amounting to the sum of $32,000.00, and the fair annual rental of the said premises, to wit, the sum of $2,400.00 per year for a period of three years, and the further sum of $2,700.00 per year for a period of three years, three months, being the balance of said terms as called for in said lease	16,025.00
Total	$16,625.00 (R. 2)

Respondent, as trustee in bankruptcy, objected to all of the claim except $1000, which represents the rental deficiencies accrued at the date of the filing of the bankruptcy petition (R. 17), and the referee in bankruptcy sustained the objection and reduced the claim to $400 ($600 having been paid petitioner by the respondent under the New Jersey priority statute) (R. 37-38).

The balance of the claim, which was disallowed and expunged by the referee, was for the difference between the rent reserved in the lease and the reasonable rental value of the premises from the date of

the bankruptcy petition to the date specified in the lease for the termination thereof, which petitioner demands under the above referred to indemnity covenant contained in the lease. Although this balance of the claim (to which we shall hereafter refer as the claim) is the same as that allowed by this court in *Irving Trust Company* v. *A. W. Perry, Inc.*, 293 U. S. 320, it is based on a covenant entirely dissimilar from the one contained in the lease in the *Perry* case, and the same in all pertinent respects with the lease covenant in *Manhattan Properties, Inc.* v. *Irving Trust Company, supra,* where the claim was held not provable.

The correctness of the liquidation of the claim is not here involved, the parties having stipulated before the referee that the determination of the amount of petitioner's damages and the liquidation of his claim be reserved pending determination of the primary question—whether the claim of the petitioner is one provable in bankruptcy (R. 19-20).

The order of the referee disallowing the claim was affirmed by the District Court for the Southern District of New York (R. 42), with opinion by Judge Murray Hulbert (R. 43-48), reported at 10 F. Supp. 733, and by the Court of Appeals for the Second Circuit, with a memorandum opinion (R. 52-53) reported at 77 Fed. (2nd) 1012. The memorandum opinion of the Court of Appeals for the Second Circuit affirmed the orders below on authority of *In re F. & W. Grand 5-10-25 Cent Stores,* 74 Fed. (2nd) 654 (C. C. A. 2). Certiorari was granted by this court June 3rd, 1935.

Question Presented.

Is a claim for rent deficiencies which may accrue subsequent to the filing of a petition in bankruptcy based upon a covenant contained in a lease of real

estate wherein it is provided that the tenant shall pay to the landlord the deficiency between the rents reserved in the lease and the avails of re-letting, as such deficiency shall accrue from month to month, provable in bankruptcy?

Statutes Involved.

Section 63 of the Bankruptcy Act provides:

> "Debts which may be proved. (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account, or upon a contract express or implied; * * *
>
> (b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Section 1 (11) provides:

> "'debt' shall include any debt, demand or claim provable in bankruptcy;"

Section 17 provides:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts" * * * with exceptions not here material.

(Act of July 1, 1898, Sections 1, 17 and 63, 30 Stat. 562, as amended; U. S. C., Title 11, Sections 1, 35 and 103.)

Summary of Argument.

I.

Claims for future rent and for damages for breach of lease are not provable in bankruptcy. *Manhattan Properties, Inc.* v. *Irving Trust Company*, 291 U. S. 320.

Although a covenant contained in a lease may give rise to a provable claim where it is stipulated in the covenant that upon bankruptcy the landlord shall be entitled to receive as damages the difference between the rents reserved in the lease and the rental value to the end of the term, *Irving Trust Company* v. *A. W. Perry, Inc.*, 293 U. S. 320, the basis of the allowance of the claim is the stipulation contained in the covenant and not that the claim is based on *an* independent covenant rather than the lease itself.

The present covenant provides that the tenant shall pay to the landlord the deficiency between the rents reserved in the lease and the avails of reletting, as such deficiency shall accrue from month to month. Therefore, pursuant to the stipulation of *this* covenant, whether or not there would be any loss was contingent upon events which could happen only after petition time. At petition time not only was the *amount* of loss uncertain, but also the *fact* of loss under the covenant.

Claims for the difference between the rents reserved in the lease and the rental value of the premises, based upon covenants similar in all pertinent respects to the present one, were held not maintainable.

McCready v. *Lindenborn*, 172 N. Y. 400;
and
Matter of Hevenor, 144 N. Y. 271.

The contingencies of petitioner's claim are not within his control, but are uncontrollable events happening after bankruptcy and bar the proof of the claim. *Maynard* v. *Elliott,* 283 U. S. 273.

> "If the damage clause as drawn gives inadequate protection, the fault is with the draftsman. The courts are not at liberty to supply its omissions at the expense of the tenant whose liability for the future ended with the cancellation of the lease, except in so far as he bound himself by covenant to liability thereafter." *Hermitage Co.* v. *Levine,* 248 N. Y. 333, 338-339.

II.

The basis of petitioner's claim is that at petition time the lease had already been terminated, the only liability of the tenant surviving this termination being upon the indemnity covenant which was anticipatorily breached by the filing of the bankruptcy petition, entitling petitioner to the difference between the rents reserved in the lease and the rental value of the premises to the end of the original term. *The defects in the argument are* (in addition to those discussed under Point I):

1. *The indemnity covenant is a contract for the payment of money and the doctrine of anticipatory breach does not apply to such contracts. A covenant similar in all pertinent respects was held not subject to the doctrine in McCready* v. *Lindenborn,* 172 N. Y. 400.

This limitation of the doctrine was recognized in Central Trust Company v. *Chicago Auditorium Association,* 240 U. S. 581, *and Roehm* v. *Horst,* 178 U. S. 1.

2. *The measure of damages applied by petitioner, although applicable to the breach of ordinary contracts, is not applicable here, the historical distinction between covenants relating to realty and personalty having been adhered to by this Court, and the only liability of a tenant surviving the termination of a lease being on the covenant, which in this case relates to the realty—the future fruits of the demised premises.*

Gardiner v. *Butler*, 245 U. S. 603;
Central Trust Co. v. *Chicago Auditorium Association*, *supra*.

III.

The situation presented in the instant case is precisely the same as that in *Manhattan Properties* v. *Irving Trust Company*, *supra*—the covenants in both cases being similar in all pertinent respects—with the one exception, that in the latter case there had been no reentry prior to petition time, while in the present case, the landlord had reentered prior to petition time.

The fact that the landlord had not reentered at petition time in the *Manhattan Properties* case was not necessary to the decision, and the authority of that case demands affirmance of the order below.

Argument.

I.

Claims for future rent and for damages for breach of lease are not provable in bankruptcy. A provable claim may be founded upon a covenant contained in a lease contract provided that at petition time the fact of loss thereunder is established and such loss is capable of liquidation. The covenant contained in the present lease cannot serve as the basis for a provable claim, as at petition time whether there would be any loss thereunder was contingent upon subsequent events not within the control of the landlord.

(1) *Claims for future rent and for damages for breach of lease are not provable.*

The question here presented involves no principle of law that has not been already established by this Court. The general question of the provability in bankruptcy of claims for future rent and for damages for breach of lease and failure to pay rent was presented in *Manhattan Properties, Inc.* v. *Irving Trust Company,* 291 U. S. 320, where this Court held that all such claims were not provable. In that case Mr. Justice Roberts, writing for the Court, stated at page 335, referring to the present Bankruptcy Act:

> "In view of the extended consideration and discussion which preceded the passage of the Act, the failure to include a provision *for claims for loss of rent or for damages consequent on the abrogation of leases,* is significant of an intent not to depart from the precedents disallowing them. *Schall* v. *Camors, supra* (251 U. S. pp. 250, 251, 64 L. ed. 252, 253, 40 S. Ct. 135, 45 Am. Bankr. Rep. 599).
>
> Soon after the passage of the Act several

federal courts were called upon to decide the question, and they uniformly held such claims were not provable debts under §63."

And at page 336:

"What of the activities of the Congress while this body of decisions interpreting §63a was growing? From 1898 to 1932 the Bankruptcy Act was amended eight times without alteration of the section. This is persuasive that the construction adopted by the courts has been acceptable to the legislative arm of the government. *Baltimore & O. R. Co.* v. *Baugh,* 149 U. S. 368, 372, 37 L. ed. 772, 775, 13 S. Ct. 914.

In this situation 'only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted'. *Maynard* v. *Elliott, supra* (283 U. S. 277, 75 L. ed. 1031, 51 S. Ct. 390, 17 Am. Bankr. Rep. (N. S.) 501.) If the rule is to be changed Congress should so declare." (Italics supplied.)

(2) *Although a lease covenant may give rise to a provable claim, the basis of the allowance of the claim is the stipulation of the covenant, and not that the claim is based on an independent covenant.*

The principle of the *Manhattan Properties* case was in no wise narrowed by the decision in *Irving Trust Company* v. *A. W. Perry, Inc.,* 293 U. S. 320, where this Court held provable in bankruptcy a claim based upon a covenant providing that bankruptcy should be a breach of the lease, and the consequent damages to the lessor measured by the difference between the present value of the remainder of the term and the total rent to fall due in the future. In concluding his opinion in the *Manhattan Properties*

case, Mr. Justice Roberts stated with reference to the indemnity covenant in the lease there involved:

> "Such a covenant is not, as petitioners contend, the equivalent of an agreement that bankruptcy shall be a breach of the lease and the consequent damages to the lessor be measured by the difference between the present value of the remainder of the term and the total rent to fall due in the future" (pp. 338-339).

The decision in the *Perry* case is in thorough harmony and complete accord with that in the *Manhattan Properties* case. The covenant in the *Perry* case provided a fair formula for the estimation of the damage—the difference between the present value of the remainder of the term and the total rent to fall due in the future—and since the prescribed measure of damages did not sound in penalty, it was enforcible. Such a covenant twice before had been held by this Court to serve as the basis for proving a claim in an equity receivership.

Wm. Filene's Sons Co. v. *Weed*, 245 U. S. 597;
Gardiner v. *William S. Butler & Co., Inc.*, 245 U. S. 603.

The landlord in the *Perry* case, by virtue of the independent express covenant in the lease contract, at the moment of the filing of the bankruptcy petition, was possessed of a cause of action at law against the tenant for the then value of the difference between the rent reserved in the lease to the end of the term, and the rental value of the demised premises for the same period. There was no question as to whether the landlord would suffer any actual loss. The actual amount for which the landlord might subsequently relet the premises was immaterial. By express contract the parties liquidated the damage

upon a fair basis, and stipulated that the landlord was immediately entitled to receive this sum upon the termination of the lease. This Court did not provide a measure of damages for the breach, but merely enforced the measure of damages stipulated in the covenant by the parties, stating:

> "We concur in the view that the contract, as its terms were interpreted and applied (by the court below), supports a provable claim for the stipulated damages."

(3) *The stipulation of the present covenant does not provide for a measure of damages, but for indemnification after bankruptcy, contingent upon uncontrollable events occurring after bankruptcy.*

The stipulation in the instant lease is otherwise. The covenant provides that in the event of the termination of the lease the tenant shall pay to the landlord *the deficiency between the rent reserved and the avails of re-letting, as such deficiency shall accrue from month to month* (R. 7). At the time of the filing of the bankruptcy petition there was no amount due the landlord, pursuant to this covenant, *and no amount might ever become due thereunder.* Unlike the covenant in the *Perry* case, which gave the landlord immediately upon the termination of the lease a single and immediate cause of action for the difference between the rent reserved in the lease to the end of the term and the rental value of the premises, the covenant in the present lease gave the landlord no cause of action upon the termination of the lease. Under this covenant a separate and independent cause of action would arise each month subsequent to termination, in which a deficiency should actually occur, *but whether such deficiency would occur and if so, the amount thereof, was uncertain at petition time.*

In *McCready* v. *Lindenborn*, 172 N. Y. 400, exactly the same situation was presented to the Court of Appeals of the State of New York. There the covenant in the lease read substantially the same as the present one—it provided that upon certain defaults of the tenant the landlord might reenter and terminate the lease, whereupon the tenant should pay to the landlord monthly the difference between the rent reserved in the lease and the avails of reletting. Default was made by the tenant, whereupon the landlord exercised his option and reentered the premises and terminated the lease. The landlord then instituted suit against the tenant, before the expiration of the original term, for the difference between the rent reserved in the lease to the end of the term and the rental value of the premises—the precise position here taken by the petitioner. The Court held that the action was not maintainable; that a single cause of action for the difference between the rent reserved and the rental value to the end of the original term did not arise, saying at pages 406-407:

> "One unbroken covenant survived re-entry, because it provided expressly for that contingency by authorizing the lessor to relet the premises and requiring the lessee to pay any deficiency in equal monthly payments as the amount thereof should, from month to month, be ascertained by deducting from the rent reserved the rents received, less the expense of such repairs as the tenant covenanted to make and less also, as is reasonably to be implied from authority to relet, the reasonable expenses of reletting and collecting. *By the express contract of the parties a separate and independent cause of action arose under this covenant every month when there was a deficiency ascertained in the manner provided.* The plaintiff was at

liberty to allow the causes of action for monthly deficiency to accumulate and to recover upon several at the same time, *but she could not recover any deficiency until it had actually accrued and had been ascertained in the mode provided by the covenant.*" (Italics supplied.)

Likewise, the present petitioner, whose claim is based upon a covenant similar in all pertinent respects "could not recover any deficiency until it had actually accrued and had been ascertained in the mode provided by the covenant". At petition time the deficiency which might accrue in the future obviously had not already accrued. The covenant prescribed the mode of ascertaining the deficiency—the difference between the rent reserved and the actual avails of reletting, not a guess as to the probable future fruits of the demised premises. And at petition time it was uncertain whether there would ever be any deficiency, as such deficiency could be ascertained only by events happening subsequent to petition time.

Petitioner argues under Point IV of his brief that his damage was capable of liquidation—that the measure of damages for the breach was the difference between the total amount of rent reserved in the lease to the end of the original term and the rental value of the premises for the same period, and refers to this Court's decisions in *Irving Trust Company* v. *A. W. Perry, Inc., supra,* and *Wm. Filene's Sons Co.* v. *Weed, supra,* in pointing out the fairness of the measure. Petitioner, however, loses sight of the fact that in both these cases this measure had been agreed upon by the parties to the lease, and this Court was not applying or fixing a measure of damages for the breach, but merely enforcing a valid stipulation expressly made by the parties themselves. Petitioner incorrectly urges that the basis upon which the objection to the provability of the claim is founded, is that

the damages cannot be ascertained with mathematical certainty. *The basis of the objection is that at petition time it was uncertain whether there would actually be any loss.*

The language of Circuit Judge Learned Hand, in writing the opinion for the Court of Appeals for the Second Circuit, in *A. W. Perry, Inc.* v. *Irving Trust Company,* 69 Fed. (2nd) 90, affirmed with opinion, 293 U. S. 320 readily exposes the fallacy of petitioner's argument:

> "It is the uncertainty in fact of the loss that invalidates the claim; that is not remedied by an approximation which the law will accept in other connections. But where the parties have agreed that the lessee shall pay a sum to be ascertained by an accessible standard, the Bankruptcy Court is not liquidating a future loss at all; in its place the parties have substituted a promise, which does not look to the future, which is to pay the difference between two amounts presently ascertainable" (p. 91).

While it is true that contingent claims may be provable in bankruptcy, this is so only where the contingency is within the control of the creditor. In *Maynard* v. *Elliott,* 283 U. S. 273, it was urged by the trustee in bankruptcy that the claim against the bankrupt endorsers upon promissory notes unmatured at the date of bankruptcy was not provable, as the accrual of any indebtedness against the bankrupt endorsers was contingent upon notice of dishonor being given at maturity, which would be subsequent to the time of the filing of the bankruptcy petition. This court allowed the claim stating with regard to the contingency—"and the contingency of notice of dishonor to the endorser is *within the control of the creditor*" (278). (Italics supplied.) Likewise in

Williams v. *United States Fidelity and Guaranty Co.*, 236 U. S. 549, there was no contingency not within the control of the creditor.

And in *Maynard* v. *Elliott, supra,* it was specifically pointed out that "The contingency of the bankrupt's obligation may be such as to render any claim upon it incapable of proof" (278). *The claim of the present petitioner is dependent upon the rents actually received by him subsequent to petition time, as pursuant to the stipulation of the covenant the amount thereof must be deducted from the rents reserved in the lease in order to determine the fact and the amount of loss.* The contingencies of the bankrupt's obligation are not within the control of the petitioner and are precisely the same contingencies which bar a claim for future rent.

See:

In re Roth & Appel, 181 Fed. 667 (C. C. A. 2).

A similar situation was presented in *Matter of Hevenor,* 144 N. Y. 271, where the Court of Appeals of New York State held:

> "The effect of exercising the latter option (to enter and re-let the premises) was to terminate the agreement to pay the monthly rent and, thereafter, to leave the matter of any liability of the lessee to them contingent upon the success which the lessors might meet with, in re-letting the premises; a liability which, if it arose, could only be finally and definitely ascertained at the expiration of the demised term; while it might not arise at all.
>
> Under such circumstances, what claim these appellants could have against the assignor, or his assigned estate, must be uncertain and contingent" (273).

It is argued by the petitioner under Point I of his brief that upon the termination of the lease the relationship of landlord and tenant ceased, the only surviving liability of the bankrupt being upon the indemnity covenant. This rule of law is too well-settled to permit of argument. The claim of petitioner is based upon this indemnity covenant which clearly describes the surviving liability—*to pay the deficiency between the rent reserved in the lease and the avails of reletting as such deficiency shall accrue from month to month.* The petitioner stipulated that his damage be ascertained every month upon the basis of that month's reletting, and expressly made the bankrupt's surviving liability contingent upon the future rents. The petitioner did *not* stipulate as did the landlord in *Irving Trust Company* v. *A. W. Perry, Inc.*, that the tenant's liability be fixed immediately upon the termination of the lease by deducting, from the rents reserved in the lease to the end of the term, the rental *value* of the premises for a like period. As was said by Mr. Justice Cardozo (then Chief Judge of the Court of Appeals of New York State) in *Hermitage Co.* v. *Levine*, 248 N. Y. 333:

> "If the damage clause as drawn gives inadequate protection, the fault is with the draftsman. The courts are not at liberty to supply its omissions at the expense of the tenant whose liability for the future ended with the cancellation of the lease, except in so far as he bound himself by covenant to liability thereafter" (pp. 338-339).

II.

The present covenant is a contract for the payment of money, and the doctrine of anticipatory breach does not apply to such contracts. In any event, although the present value of a contract is the ordinary measure of damages for its breach, this rule is inapplicable to the present covenant "because of the diversity betweene duties which touch the realty and the meere personalty".

The basis of petitioner's argument in support of the provability of his claim is:

> 1. Prior to petition time the landlord reentered, thus terminating the lease. The covenant in the lease requiring the tenant to pay monthly the difference between the rent reserved and the avails of reletting during the balance of the term survived the termination of the lease (Point I, Petitioner's Brief, p. 6).
>
> 2. The filing of the bankruptcy petition constituted an anticipatory breach of this covenant by the tenant and immediately entitled the landlord to the then value of the contract, which was the difference between the rent reserved and the rental value of the premises to the end of the term (Points II and III, Petitioner's Brief, pp. 7 to 15).

(1) *The covenant is a contract for the payment of money only, to which the doctrine of anticipatory breach does not apply.*

The difficulty with petitioner's position is that the filing of the bankruptcy petition did not constitute an anticipatory breach of this covenant. It is not every contract to which the doctrine of anticipatory breach is applicable, and the decisions of this Court cited by petitioner so declare.

Central Trust Company v. *Chicago Auditorium Association,* 240 U. S. 581;
Roehm v. *Horst,* 178 U. S. 1.

The principle of anticipatory breach was recognized by this Court in *Roehm* v. *Horst, supra, as was also the limitation of the principle.* At page 17 Chief Justice Fuller pointed out:

> "In the case of an ordinary money contract, such as a promissory note, or a bond, the consideration has passed; there are no mutual obligations; and cases of that sort do not fall within the reason of the rule."

And at page 18:

> "We think it obvious that both as to renunciation after commencement of performance and renunciation before the time for performance has arrived, money contracts, pure and simple, stand at a different footing from executory contracts for the purchase and sale of goods."

In *Central Trust Company* v. *Chicago Auditorium Association, supra,* this Court held that bankruptcy constituted an anticipatory breach not of every contract, but of such contracts to which the doctrine of anticipatory breach was applicable. Here again the limitations of the doctrine were recognized, this Court stating at page 589:

> "Coming to the merits: It is no longer open to question in this Court, that as a rule, where a party bound by an executory contract repudiates his obligations or disables himself from performing them before the time for performance, the promisee has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anti-

cipatory breach. *The rule has its exceptions, but none that now concerns us.*" (Italics supplied.)

In *McCready* v. *Lindenborn,* 172 N. Y. 400, to which we have heretofore adverted, the precise question here involved was presented. The covenant read substantially the same as the present one, obligating the tenant, upon the termination of the lease by reason of his default, to pay to the landlord monthly, the difference between the rent reserved and the avails of reletting for the balance of the term. Subsequent to the termination of the lease by the landlord because of the default of the tenant, and prior to the expiration of the balance of the term, the latter breached the indemnity covenant by defaulting in making payment of the monthly deficiencies when due, whereupon the landlord instituted suit for the difference between the rent reserved in the original lease and the rental value, to the end of the term, upon the theory that the failure of the tenant to perform the terms of the indemnity covenant constituted an anticipatory breach of the covenant. The Court of Appeals held the doctrine of anticipatory breach inapplicable, stating at page 408:

> "The breach of an agreement to pay money in installments is not a breach of the entire contract and will not permit a recovery of all the damages in advance. (*Wharton & Co.* v. *Winch,* 140 N. Y. 287; *Moore* v. *Taylor,* 42 Hun 45.)"

And to the same effect:

> *Kelly* v. *Security Mutual Life Insurance Co.,* 186 N. Y. 16;
> *Ambler Garage Inc.* v. *People,* 235 App. Div. 548 (N. Y.);
> *Werner* v. *Werner,* 169 App. Div. 9 (N. Y.).

The obligation of the bankrupt under the covenant was simply to pay money in installments, and the doctrine of anticipatory breach not being applicable to such a contract, the filing of the bankruptcy petition could not and did not act as a breach of the covenant. The covenant gave rise to a separate and independent cause of action every month during the balance of the term when and if there was a deficiency ascertained in the manner provided.

McCready v. *Lindenborn, supra.*

At the time of bankruptcy these causes of action had not arisen—nor might they ever arise—and consequently, there was no basis upon which a claim in bankruptcy could be founded.

(2) *Although the value of a contract is the ordinary measure of damages for its breach, this rule is inapplicable to the present covenant, "because of the diversity betweene the duties which touch the realty and the meere personalty".*

Upon the termination of a lease of real estate, the relationship of landlord and tenant is at an end, and no liability survives this termination, except by express covenant. And where a covenant in the lease provides for liability of the tenant surviving the termination of the lease, the nature and extent of that liability is confined to the stipulation of the covenant.

Gardiner v. *Butler, supra*;
Manhattan Properties v. *Irving Trust Company, supra*;
McCready v. *Lindenborn, supra*;
Hermitage Co. v. *Levine, supra.*

Gardiner v. *Butler, supra,* presents an interesting contrast between the law of real estate and personal property, and is a complete answer to petitioner's

argument that the ordinary measure of damages—the present value of the contract, which is the difference between the rent reserved and the rental value to the end of the term—applies. There the provability of two lease claims in equity receivership was involved: The first claim was based on a covenant similar to that in *Wm. Filene's Sons Co.* v. *Weed, supra,* and *Irving Trust Company* v. *A. W. Perry, Inc., supra,* wherein a measure of damages for breach of lease was expressly stipulated—the difference between the rent reserved to the end of the original term, and the rental value of the premises. The second claim was merely for damages resulting from the breach of the lease—the claimant contending that he lost the benefit of his bargain and was therefore entitled to recover his loss, which was the value of his contract. In allowing the first claim and disallowing the second, Mr. Justice Holmes wrote:

> "The second claim is upon a lease by Russell to the same Company of which Gardiner had purchased the reversion. In substance it is for damages similar to those held allowable under the former lease, but simply on the ground that the petitioner has lost the benefit of his bargain from the time of his reentry, the lease not containing any clause stipulating for such an allowance. *Of course, there are plausible analogies for the contention. But the law as to leases is not a matter of logic in vacuo; it is a matter of history that has not forgotten Lord Coke*" (605). (Italics supplied.)

This historical, albeit not logical distinction between the law of real estate and that of personal property was also commented upon by this Court in *Central Trust Company* v. *Chicago Auditorium Association, supra,* where it was observed:

> "Cases of the latter class are distinguishable

because of the 'diversity betweene duties which touch the realty, and the meere personalty'. Co. Litt. 292b, §513" (590).

Despite the fact that the lease may have been terminated prior to the filing of the bankruptcy petition, the covenant upon which the instant claim is based nevertheless relates to realty—the premises demised in the lease. The stipulation of the covenant is that the tenant will pay monthly the deficiency, if any, on the reletting of the demised premises. In other words, the obligation of the tenant is one of guaranty that the landlord will relet the premises and collect monthly from the new tenant, rent, which shall not be less than that reserved in the original lease. But no matter how the covenant is viewed, the conclusion is inescapable that the loss of the landlord is dependent on the rents he receives in the future from the demised premises, and the reasons precluding the proof of claims for future rent obtain here.

See:

Marshall & Ilsley Bank v. *Irving Trust Company,* 70 Fed. (2nd) 691 (C. C. A. 2), certiorari denied, 293 U. S. 590.

The cases cited by petitioner in support of his contention that this measure of damages is applicable, deal with contracts relating to personal property, *Roehm* v. *Horst, supra; Central Trust Company* v. *Chicago Auditorium Association, supra; Pennsylvania Steel Co.* v. *New York City Railway Co.,* 198 Fed. 721 (C. C. A. 2); with covenants expressly providing for the measure, *Irving Trust Company* v. *A. W. Perry, Inc., supra; Wm. Filene's Sons Co.* v. *Weed, supra;* or with covenants dealing with leases of real estate in states where courts have not adhered to this historical distinction between covenants re-

lating to personalty and realty, *Leo v. Pierce Stores Co.*, 57 Fed. (2nd) 340 (D. C. Mich.); *Kalkhoff* v. *Nelson*, 60 Minn. 284; *Minneapolis Baseball Co.* v. *City Bank*, 74 Minn. 98; *Reading Iron Works—Sweatman's Appeal*, 150 Penn. St. Rep. 369.

Petitioner also cites in support of the provability of his claim *In re Mullings Clothing Co.*, 238 Fed. 58 (C. C. A. 2), and *Lloyd Investment Co.* v. *Schmidt*, 66 Fed. (2nd) 371 (C. C. A. 7). The former case was thrice disapproved by the same court which rendered the decision.

> *T. A. D. Jones* v. *Winchester*, 61 Fed. (2nd) 774 (C. C. A. 2);
> *Malavazos* v. *Irving Trust Co.*, 66 Fed. (2nd) 482; and
> *In re F. & W. Grand 5-10-25 Cent Stores, Inc.*, 69 Fed. (2nd) 807 (C. C. A. 2);

and later expressly overruled by that court.

> *Urban Properties Co.* v. *Irving Trust Company*, 74 Fed. (2nd) 654 (C. C. A. 2).

The decision of the Court of Appeals for the Seventh Circuit, in *Lloyd Investment Co.* v. *Schmidt, supra*, was based upon that of the Second Circuit in *In re Mullings Clothing Co., supra*, and the reasoning of both cases fell with this Court's decision in the *Manhattan Properties* case.

In *Urban Properties Co.* v. *Irving Trust Company, supra*, equity receivers were appointed prior to bankruptcy, and disaffirmed the lease before the commencement of the demised term. The landlord sought to prove a claim in the subsequent bankruptcy proceeding for the difference between the rents reserved in the lease, and the rental value of the premises, although the covenant contained no such stipulation,

but provided—as does the instant covenant—that the tenant shall pay the deficiency between the rent reserved and the avails of reletting, monthly. The Court of Appeals for the Second Circuit, in disallowing the claim, stated:

> "and that uncertainty (amount of loss) is as great when the lessee has not entered, as when he has; perhaps more. Nobody can tell in either case how long the term would have lasted or how many installments would ever have become due. True, that uncertainty is no greater than the law has met and answered in other situations, but the doctrine is based in history not logic" (656).

III.

The situation presented in the instant case is identical with that in *Manhattan Properties, Inc.* v. *Irving Trust Company, supra,* with one exception—in the *Manhattan Properties* case there had been no reentry before bankruptcy, whereas, here petitioner had reentered. The fact that the landlord had not reentered prior to bankruptcy was not necessary to the decision in the *Manhattan Properties* case, and upon the authority of that case the order below sustaining the disallowance of the claim must be affirmed.

The claim of petitioner is based upon an indemnity covenant similar in all pertinent respects to the indemnity covenant considered by this Court in *Manhattan Properties, Inc.* v. *Irving Trust Company, supra.* The situations in both cases are identical—with one exception. In the *Manhattan Properties* case the landlord had not reentered at petition time, whereas the present petitioner had reentered the premises prior to the date of the filing of the bankruptcy petition.

The inquiry therefore is whether the fact that the landlord had not reentered at the time of the filing of the petition in the *Manhattan Properties* case was necessary to the decision of the case—if it was not, the instant claim must be disallowed on the authority of the *Manhattan Properties* case.

In that case the question presented was whether a landlord might prove in bankruptcy for loss of rents payable in the future, and in the alternative, whether a landlord might prove in bankruptcy upon the indemnity covenants contained in the leases (the opinion embraced two cases). After holding that the claim in so far as it was for loss of future rents based upon the rent covenant was not provable, this Court went on to consider the effect of the indemnity covenants, Mr. Justice Roberts, writing for the Court, stating at page 337:

> "It remains to consider the effect of the indemnity covenants in the leases. These do not provide for liquidation of damages (compare *William Filene's Sons Co.* v. *Weed*, 245 U. S. 597, 62 L. ed. 497, 38 S. Ct. 211, 41 Am. Bankr. Rep. 18, *supra*), nor indeed for any right to damages for breach of covenant to pay rent."

The covenant in the first of the cases, Number 505, was substantially the same as the present covenant—the tenant agreed to pay each month the deficit accruing between the amount to be paid as rent under the lease and the amount received by the landlord from the premises throughout the residue of the original term. In the second case, Number 506, the tenant agreed that "it would indemnify the lessor against all loss of rent which the lessor may incur by reason of such termination during the residue of the term" (pp. 337-338).

After describing these covenants, Mr. Justice Roberts pointed out that the contract of indemnity is initiated by the act of reentry, and that until the reentry is made by the landlord, the contract of indemnity is not initiated; since no reentry was made by the landlord prior to the filing of the petition, at petition time the contract of indemnity had not come into being.

But the matter did not rest there. The opinion went on to show that in no event could the contracts of indemnity, even though they had been initiated prior to petition time, serve as a basis for a provable claim, *since the expiration date specified in the lease had not yet arrived*:

> "Obviously, this contract of indemnity is not breached by bankruptcy, *and cannot be breached until the duty of indemnifying the landlord arises. That obligation cannot be complete until the expiration of the original term*" (338). (Italics supplied.)

And even had the contract of indemnity been initiated prior to the filing of the petition by an act of reentry, it would not have been breached by the bankruptcy, since the doctrine of anticipatory breach is not applicable to this contract (Point II of this Brief, pp. 18-21). Whether the contract of indemnity was or was not initiated at petition time by a reentry of the landlord was immaterial—*in either event, that contract could not be breached until the duty of indemnifying the landlord arose, and that duty could not be complete until the expiration of the original term.*

The contract of indemnity in the *Manhattan Properties* case was held to be incapable of supporting a proof of claim in bankruptcy for two reasons:

1. The contract of indemnity had not been

initiated at petition time, since there had been no reentry; and

2. The contract of indemnity could not be breached until the duty of indemnifying arose, and that duty could not be complete until the expiration of the term. Fulfillment of the contract was therefore contingent upon events which would occur subsequent to the filing of the bankruptcy petition.

"There can be no debt provable in bankruptcy arising out of a contract which becomes effective only at the claimant's option, and after the inception of the proceedings, *the fulfillment of which is contingent on what may happen from month to month or up to the end of the original term"* (p. 338). (Italics supplied.)

The fact that there had not been a reentry prior to petition time was not necessary to the decision. Even had the contract of indemnity been initiated at petition time, the contract would nevertheless have been one "the fulfillment of which is contingent on what may happen from month to month or up to the end of the original term". Since the present claim is identical with those involved in the *Manhattan Properties* case, except for the reentry prior to petition time, this case is ruled by the *Manhattan Properties* decision, and the order below sustaining the disallowance of the claim must be affirmed.

IV.

The decision of the Court of Appeals for the Second Circuit, sustaining the disallowance of the claim should be affirmed.

Respectfully submitted,

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